



Federal Communications Commission
Washington, D.C. 20554

February 11, 2022

DA 22-144
In Reply Refer To:
1800B3- DB

Bob Silverman, Esq.
Womble Bond Dickinson (US) LLP
1200 19th Street, N.W. Suite 500
Washington, DC 20036
bob.silverman@wbd-us.com

Matthew H. McCormick, Esq.
Fletcher, Heald & Hildreth, PLC
1300 North 17th Street 11th Floor
Arlington, VA 22209
mccormick@fhhlaw.com

In re: DKHTZ(FM), Ganado, Texas
Facility ID No. 27619
File No. BRH-20130328ADT

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration (Petition) filed by S Content Marketing, LLC (SCM) seeking review of a staff decision dismissing the referenced application for renewal of license (Application) for station KHTZ(FM), Ganado, Texas (KHTZ(FM)),¹ and related responsive pleadings.² Currently, SCM is the licensee of KHTZ(FM), and its sole principal is Roy E. Henderson (Henderson). Between March 2008 and October 2017, Henderson, in his personal capacity, held the license for KHTZ(FM) (formerly known as station KULF(FM)) before transferring the license to SCM in October 2017. For the reasons discussed below, we grant in part and otherwise deny the Petition, revert the Application to pending status, and reinstate KHTZ(FM)'s license and call sign. Additionally, we address the dispute between Henderson and Victoria regarding unpaid reimbursement to Victoria for expenses it incurred in changing the frequency of KVIC(FM) to accommodate an upgrade of KHTZ(FM).³ We order

¹ Petition for Reconsideration and Petition for Stay, S Content Marketing, LLC, File No. BRH-20130328ADT (filed Oct. 17, 2019) (Petition); Letter from Albert Shuldiner, Chief, Audio Division, FCC Media Bureau, to John Trent, Esq., and Matthew McCormick, Esq., File No. BRH-20130328ADT (Sept. 12, 2019) (Dismissal Letter); *See* File No. BRH-20130328ADT (filed Mar. 28, 2013).

² Victoria Radio Works (Victoria), licensee of KVIC(FM), Victoria, Texas, filed an Opposition to SCM's Petition on October 30, 2019 (File No. BRH-20130328ADT) (Opposition). SCM supplemented its Petition on August 28, 2020 (File No. BRH-20130328ADT) (Supplement). Victoria responded to SCM's Supplement on October 5, 2020 (File No. BRH-20130328ADT) (Response to Supplement).

³ *See Markham, Ganado, and Victoria, Texas*, Report and Order, 25 FCC Rcd 836 (MB 2010) (*Ganado Order*) (granting Fort Bend's counterproposal to upgrade its licensed station KHTZ(FM) from channel 284C2 to channel

Henderson to remit to Victoria within 30 days of the date of this letter the sum of \$96,566.58. We will hold in abeyance further action on the Application pending notification by Henderson that full payment of \$96,566.58 to Victoria has been made.

Background. More than fourteen years ago, SCM's predecessor, Fort Bend Media Broadcasting Company (Fort Bend), filed a counterproposal in an FM allotment rulemaking proceeding, seeking to upgrade KHTZ(FM) from channel 284C2 to channel 235C at a new transmitter site, and to modify the license of KVIC(FM) to specify channel 284C3 in lieu of channel 236C3 at Victoria, Texas.⁴ On January 29, 2010, the Media Bureau's Audio Division (Division) adopted the Counterproposal and involuntarily modified the license of KVIC(FM) to accommodate KHTZ(FM)'s upgrade.⁵ Fort Bend pledged to reimburse Victoria for its reasonable and prudent out-of-pocket expenses incurred in making the requested channel change.⁶

235C at a new transmitter site and involuntarily modifying the license of station KVIC(FM) to accommodate the upgrade). Henderson was the sole owner of Fort Bend, holding 100 percent of its voting rights. On March 13, 2008, Fort Bend transferred the licenses of several of its stations to Henderson in his personal capacity. See File No. BALH-20080305ADJ. Henderson held the licenses of the stations, including the license for KHTZ(FM), for nine years before transferring them to SCM on October 10, 2017. See File No. BALH20160830AAX. Because Henderson held the KHTZ(FM) license in his personal capacity for the majority of the dispute's duration, we refer to Henderson when discussing the outstanding reimbursement obligation. When discussing the instant Petition and the arguments raised therein, we refer to SCM.

⁴ *Markham, Ganado, and Victoria, Texas*, Notice of Proposed Rulemaking, 22 FCC Rcd 15125 (MB 2010); Comments and Counterproposal, Fort Bend Media Broadcasting Company, MM Docket 07-163, RM-11385 (rec. Sept. 28, 2007) (Counterproposal).

⁵ See *Ganado Order*. See also 47 CFR § 1.420(g) (permitting, in the course of a rulemaking proceeding, the modification of the license or permit of an FM station in the non-reserved FM band to a non-adjacent channel in the same community provided that there is no other timely filed expression of interest in the non-adjacent channel).

⁶ See Counterproposal at 4. We note that the Bureau has also referred to those expenses for which an accommodating party (*i.e.*, the party whose license was modified pursuant to section 316 of the Act) is entitled to reimbursement as "legitimate and prudent" or "reasonable" costs. See, *e.g.*, *Reconsideration Decision* at 6 ("reasonable costs associated with the channel change" and "reasonable expenses"); *KPVO(FM), Fountain Green, Utah*, Letter Order, 31 FCC Rcd 8916, 8921 (MB 2016) (*KPVO(FM)*) ("legitimate and prudent expenses for reimbursement"); *Dalhart and Perryton, Texas*, Report and Order, 22 FCC Rcd 4201, 4203, n. 7 & para. 10 (MB 2007) (discussing "legitimate and prudent costs in changing channels"); *Cheyenne, Wyoming, and Gering, Nebraska*, Report and Order, 15 FCC Rcd 7528, 7531-32, para. 8 (MMB 2000) (*Cheyenne*) (discussing "legitimate and prudent expenses for reimbursement"); *Colonial Heights, Tennessee*, Memorandum Opinion and Order, 11 FCC Rcd 18079, 18082, para. 11 (MMB 1996) (*Colonial Heights*) ("reasonable costs associated with [the] channel change"); *Castle Rock, Colorado Springs, Frisco, and Salida, Colorado; Raton, New Mexico*, Report and Order, 7 FCC Rcd 7688, 7670, para. 9 (MMB 1992) (*Castle Rock*) (discussing "legitimate and prudent expenses for reimbursement"). We view these phrases as interchangeable with the phrase "reasonable and prudent" and use them accordingly herein.

After purchasing and installing equipment for the new facilities, Victoria sought reimbursement from Henderson for itemized expenses associated with the involuntary channel change.⁷ When Henderson failed to respond to its request, Victoria asked the Commission to issue an order requiring reimbursement from Henderson and to defer action on the Application until payment had been made.⁸ On June 18, 2014, the Division issued a letter of inquiry (2014 LOI) directing Henderson to respond to Victoria's reimbursement request, and to identify any disputed expenses and the basis for the dispute.⁹

In the 2014 LOI Response, Henderson stated that he was willing to reimburse Victoria a total of \$30,126.52, which included costs for the new antenna, antenna installment and removal, logo replacement, and up to \$3,750.00 to re-tune Victoria's former transmitter. However, the 2014 LOI Response declined payment for Victoria's cost of a new transmitter (i.e., \$31,311.31).¹⁰ Rejecting this counter-offer, Victoria then sought from Henderson additional reimbursement for legal and engineering costs associated with the involuntary channel change (\$40,791.25), bringing Victoria's total reimbursement request to \$98,179.08.¹¹ Victoria also separately informed the Division of its

⁷ See Letter from Harry C. Martin, Esq., on behalf of Victoria Radio Works, to John C. Trent, Esq., and Roy E. Henderson (May 23, 2013) (Reimbursement Request) (containing the following itemized list of expenses associated with the involuntary channel change).

1. Partial payment for new antenna	\$8,311.40
2. Balance on new antenna	\$10,982.49
3. 5kW transmitter	\$31,311.31
4. Antenna removal & replacement	\$6,332.63
5. Replacement logo design	\$450.00
Total	\$57,387.83

⁸ Request for Order for Expense Reimbursement, Victoria Radio Works, File No. BRH-20130328ADT (filed July 24, 2013) (Informal Objection). The Media Bureau treated this request as an Informal Objection to SCM's Application. On June 12, 2014, Victoria renewed its request to compel reimbursement. Letter from John W. Barger, Victoria Radio Works, to Nazifa Sawez, Audio Division, Media Bureau, File No. BRH-20130328ADT (June 12, 2014).

⁹ Letter from Peter H. Doyle, Audio Division, Media Bureau, to John C. Trent, Esq., and Roy E. Henderson, File No. BRH-20130328ADT (June 18, 2014).

¹⁰ Letter from John C. Trent, Esq., on behalf of Roy E. Henderson, to Peter H. Doyle, Audio Division, Media Bureau, File No. BRH-20130328ADT (July 7, 2014) (2014 LOI Response) (arguing that it is not just or fair to require reimbursement for a new transmitter when KVIC(FM)'s former transmitter could have been re-tuned for less expense).

¹¹ Letter from Harry C. Martin, on behalf of Victoria Radio Works, to Roy E. Henderson, c/o John C. Trent, Esq., File No. BRH-20130328ADT (July 10, 2014) (Supplemental Reimbursement Claim) (stating that in addition to the amounts claimed on May 23, 2013, it is also requesting reimbursement for the following costs: \$3,500.00 for FCC Form 301 preparation; \$940.00 for FCC Form 301 filing fees; \$200.00 for the license to cover application fee; and \$36,151.25 for legal fees incurred by KVIC(FM) that Victoria states are reasonably related to the involuntary frequency change).

Supplemental Reimbursement Claim and disputed Henderson's position concerning the need for a new transmitter.¹²

In December 2017, the Division directed Henderson and Victoria to engage in good faith negotiations to determine the reasonable and prudent expenses incurred in implementing the KVIC(FM) channel change and to report to the Division in writing the outcome of those negotiations.¹³ The Division also deferred action on the Application pending resolution of the reimbursement dispute.¹⁴

More than a year passed, and the parties still had not informed the Division that they reached an agreement regarding the reimbursement amount. Consequently, on June 4, 2019, the Division notified Henderson that it would dismiss the Application for failure to prosecute unless it received confirmation that Henderson reimbursed Victoria in full.¹⁵ In a letter dated June 25, 2019, Henderson claimed that the parties would soon be filing an assignment application pursuant to an agreement allegedly reached in 2018, whereby "in lieu of a cash reimbursement payment, Henderson would instead assign to Victoria, the license and all equipment associated with his other affiliated radio station KJAZ(FM) located in Port Comfort, Texas."¹⁶ Victoria refuted this assertion, however, stating that it is "not interested in accepting the assignment of KJAZ(FM) . . . in satisfaction of Henderson's reimbursement obligation . . . [and that it] renews its claim for cash reimbursement in the amount of \$98,179.08, plus any accrued interest."¹⁷ Henderson did not respond to Victoria's renewed reimbursement request or demonstrate that it fulfilled its obligation to reimburse Victoria within the timeframe specified in the 2019 LOI.¹⁸ The Division therefore dismissed the Application for failure to prosecute pursuant to section 73.3568 of the Commission's rules (Rules) and determined that the KHTZ(FM) license expired as a matter of law under section 307(c) of the

¹² Letter from John W. Barger, on behalf of Victoria Radio Works, to Peter H. Doyle, Audio Division, Media Bureau, File No. BRH-20130328ADT (July 17, 2014) (explaining that the former KVIC(FM) transmitter was incapable of producing an effective radiated power (ERP) of 12.7 kW, the power specified in its construction permit application for the new facilities (see File No. BPH-20100419ACA) and the associated covering license application (see File No. BLH-20130502ACG)). Victoria argued that Henderson should have objected to either the construction permit application or the covering license application if he was unwilling to reimburse Victoria for the new transmitter, and that his protest at this point regarding the new transmitter expense is too late. *Id.*

¹³ See Letter from Peter H. Doyle, Chief, Audio Division, to John C. Trent, Esq., File No. BRH-20130328ADT (Dec. 14, 2017).

¹⁴ *Id.*

¹⁵ Letter from Albert Shuldiner, Chief, Audio Division, to John C. Trent, Esq., File No. BRH-20130328ADT (June 4, 2019) (2019 LOI) (stating that "[t]he Bureau will continue to withhold action on the Renewal Application for a period of thirty days from the date of this letter to provide Henderson an opportunity to demonstrate that it has reimbursed VRW for reasonable and prudent expenses associated with the KVIC channel change.") The Bureau warned that "[f]ailure to show reimbursement in full within the specified time frame may result in adverse action including dismissal of the Renewal Application for failure to prosecute pursuant to section 73.3568 of the Rules." *Id.*; 47 CFR § 73.3568(a)(1) ("Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal.").

¹⁶ Letter from John C. Trent, Esq., on behalf of Roy E. Henderson, to Marlene H. Dortch, Secretary, FCC, File No. BRH-20130328ADT (June 25, 2019).

¹⁷ See Letter from Matthew H. McCormick, Esq., on behalf of Victoria Radio Works, to Marlene H. Dortch, Secretary, FCC, File No. BRH-20130328ADT (June 27, 2019).

¹⁸ See 2019 LOI.

Communications Act of 1934, as amended (Act).¹⁹ The Division also cancelled KHTZ(FM)'s license and deleted the station's call sign.²⁰

The Pleadings. The instant Petition challenges the factual and legal bases for the actions taken in the Dismissal Letter; it does not address the underlying factual dispute concerning the reimbursement payment Henderson owes to Victoria.²¹ Specifically, SCM argues that the Bureau is restricted from taking adverse action on the Application until after notice and an opportunity for a full hearing; the dispute over the reimbursement amount is not grounds to dismiss the Application for failure to prosecute under section 73.3568(a)(1) of the Rules; and the decision to terminate the operations of KHTZ(FM), along with deletion of the KHTZ(FM) call sign, is contrary to the Act, the Rules, and the Administrative Procedure Act.²² For these reasons, SCM maintains that the Dismissal Letter must be reversed, the Application must be granted, and the KHTZ(FM) call sign and operating authority must be reinstated.²³

In its Opposition, Victoria states that it has no objection to the grant of SCM's Petition and the reinstatement of the KHTZ(FM) license if the promised \$98,179.08 payment is made.²⁴ Victoria proposes that the parties enter into a comprehensive mutual release upon the delivery of such payment.²⁵ In reply, SCM states that Henderson is ready, willing and able to immediately make the requested payment to Victoria, provided that "within the next sixty (60) days the Audio Division reverses its actions taken in the [Dismissal Letter]."²⁶ SCM further states that Henderson "will not deliver any release or indemnity to Victoria, nor is he requesting any release or indemnity from Victoria."²⁷ In response, Victoria argues that by not delivering any release or indemnity to Victoria, Henderson is not actually offering to settle its

¹⁹ See Dismissal Letter. See also 47 CFR § 73.3568; 47 U.S.C. § 307(c) ("Each license granted for the operation of a broadcasting station shall be for a term of not to exceed 8 years. Upon application therefore, a renewal of such license may be granted from time to time for a term of not to exceed 8 years from the date of expiration of the preceding license, if the Commission finds that public interest, convenience, and necessity would be served thereby. Consistent with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, the public interest, convenience, or necessity would be served by such action.").

²⁰ Dismissal Letter; *Amendment of section 73.202(b), FM Table of Allotments, FM Broadcast Stations*, Order, 35 FCC Rcd 6768 (MB 2020) (updating the FM Table by reinstating allotments that have become vacant due to the cancellation of an authorization or license).

²¹ See Petition.

²² *Id.*

²³ *Id.*

²⁴ See Opposition.

²⁵ *Id.*

²⁶ Supplement (attaching a copy of a cashier's check for \$98,179.08, made payable to Victoria, and stating that the check will be returned to SCM if there is no FCC action within sixty (60) days).

²⁷ *Id.* As discussed below, SCM/Henderson does not accept Victoria's proposal to enter into a comprehensive mutual release whereby both parties agree to drop all claims associated with the instant dispute upon the delivery of the reimbursement payment. In fact, SCM/Henderson has indicated that it/he intends to recoup a portion of any money that it/he is required to pay through this proceeding in another forum. See *infra* note 47.

dispute concerning the reimbursement amount.²⁸ Victoria asserts that it is not interested in accepting a payment just to move its years-long dispute with Henderson to another forum.²⁹

Recent Developments. After a teleconference with the parties on December 14, 2020, to discuss the Petition and on-going reimbursement dispute, the Division again directed the parties to engage in good faith negotiations to determine the reasonable and prudent expenses incurred in implementing the KVIC(FM) channel change and to refresh the record on the appropriate amount of reimbursable expenses if they are unable to do so.³⁰ The Division instructed Henderson to submit his response to Victoria's reimbursement claim by February 12, 2021, and stated that if the parties did not reach an agreement by that date, the Bureau would determine the total expenses Henderson is required to reimburse Victoria.³¹

Pursuant to this directive, Victoria submitted the following list of expenses for which it claims reimbursement as well as documentation to support the claim:³²

Expense	Cost
1. Replacement antenna	\$19,293.89
2. Replacement transmitter	\$31,311.31
3. Removal and installation of antenna	\$6,332.63
4. Replacement of logo design	\$450.00
5. Engineering services for KVIC's construction permit application	\$3,500.00
6. FCC filing fee for construction permit application	\$940.00
7. FCC filing fee for KVIC's license application	\$200.00
8. Legal fees through June 2014 related to this matter	\$36,151.25
9. Legal fees from July 2014 -December 2020 related to this matter	\$16,322.75
Total	\$114,501.83

In response, Henderson maintains its acceptance of the costs associated with the new antenna (\$19,293.89), antenna installation and removal fees (\$6,332.63), replacement of the logo design (\$450.00), engineering services related to KVIC(FM)'s construction permit application for the new facilities (\$3,500.00), and FCC filing fees (\$1,140.00).³³ However, Henderson rejects Victoria's claimed expense for a replacement transmitter, arguing that \$31,311.31 is unreasonable, imprudent, and beyond the scope of Commission precedent regarding reimbursable costs.³⁴ Additionally, Henderson disputes

²⁸ Response to Supplement.

²⁹ *Id.*

³⁰ Letter from Albert Shuldiner, Chief, Audio Division, to John F. Garziglia, Esq., File No. BRH-20130328ADT (Dec. 18, 2020) (directing Victoria to submit to the Audio Division by January 29, 2021, a list of all expenses for which it currently claims reimbursement as well as documentation to support the claim).

³¹ *Id.*

³² Letter from Matthew McCormick, Esq., on behalf of Victoria Radio Works, File No. BRH-20130328ADT (Jan. 29, 2021) (Victoria Updated Reimbursement Request). Victoria also requests permission to submit documentation of additional fees incurred in January 2021 and thereafter with respect to this matter. *Id.*

³³ Letter from Bob Silverman, Esq., on behalf of S Content Marketing, LLC, File No. BRH-20130328ADT (Feb. 12, 2021) (SMC Response to Updated Reimbursement Request).

³⁴ *Id.* (arguing that there are a multitude of available substitute components at a fraction of the cost of a newly upgraded transmitter that would have achieved the desired frequency change). *See also id.*, Technical Statement.

Victoria's claimed expenses for legal fees, arguing that many of the legal fees appear to have been incurred during prohibited *ex parte* communications or in matters not "reasonably related to the necessary change of channel."³⁵ To date, there has been no further correspondence from the parties and negotiations appear to have reached an impasse.

Discussion. We grant the Petition in part to the extent SCM seeks reconsideration of the staff's decision to dismiss the Application. The Commission will consider a petition for reconsideration only when the petitioner shows a material error of fact or law, or presents new facts or changed circumstances which raise substantial or material questions of fact that otherwise warrant reconsideration of the prior action.³⁶ Upon careful examination of the record, we acknowledge that we should not have dismissed the Application prior to adjudicating the reimbursement dispute.³⁷ We therefore rescind the cancellation of KHTZ(FM)'s license and deletion of its call sign, and reinstate them. We also revert the Application back to pending status where it will remain until Henderson complies with his reimbursement obligation as set forth below.³⁸

Reimbursement for Involuntary Channel Change. We find that the majority of Victoria's claimed expenses for changing channels are legitimate and prudent and therefore reimbursable. When an existing licensee or permittee is ordered to change frequencies to accommodate a new channel allotment, Commission policy requires the benefitting party, or parties, to reimburse the affected station for the costs incurred in changing frequencies.³⁹ In *Circleville*, the Commission stated that reimbursement is proper for: (1) engineering, legal and equipment charges; (2) printing (logs and stationery); (3) out of pocket nonreducible expenses while the station is off the air; (4) advertising promotion for the new frequency;

But see Victoria Updated Reimbursement Request (stating that the replacement transmitter was necessary because the previous transmitter was not capable of being re-tuned to the new KVIC(FM) frequency or producing sufficient power to reach 90 percent of the ERP specified in the KVIC(FM) authorization).

³⁵ *Id.*, citing *Perryton Radio, Inc., and Radio Dalhart*, Letter Decision, 28 FCC Rcd 3234, 3238 (MB 2013) (*Perryton*) (stating that, with respect to legal expenses, the Commission has allowed reimbursement for legal fees "incurred in the negotiation process" and for filing or responding to pleadings "reasonably related to the necessary change of channel"). SCM also opposes Victoria's request to recover additional legal fees incurred in January 2021 and thereafter. *Id.*

³⁶ See 47 CFR § 1.106.

³⁷ 47 U.S.C. § 307(c)(3) (stating that the filing of a renewal application continues a station's license in effect). This continuance runs through "any hearing and final decision on such an application and the disposition of any petition for rehearing." *Id.*

³⁸ See 2019 LOI (stating that the Bureau cannot grant the Application because Henderson has not, as pledged, reimbursed Victoria for reasonable and prudent expenses incurred to change KVIC(FM)'s channel and thereby facilitate KHTZ(FM)'s upgrade). See also *Entravision Holdings, LLC, KDVA(FM), Buckeye, Arizona, Memorandum Opinion and Order*, FCC 22-4, para. 20 (2022) (*Prescott Valley*) (stating that a benefitting party faces non-renewal of its station's license if it fails to honor its pledge to reimburse an accommodating party for the reasonable costs of changing its station's channel). While we are reinstating the license on procedural grounds, we caution that failure to reimburse Victoria consistent with this Letter Order may result in placing KHTZ(FM)'s renewal into hearing pursuant section 312(a) of the Act. See 47 U.S.C. § 312(a).

³⁹ See *Circleville, Ohio*, Second Report and Order, 8 FCC 2d 159, 163, para. 11 (1967) (*Circleville*) (establishing guidelines for determining reimbursement and requiring that, whenever an existing station is ordered to change frequency to accommodate another station, the benefitting station must reimburse the affected station for its reasonable and prudent expenses).

and (5) miscellaneous expenses.⁴⁰ Parties are expected to determine expeditiously, mutually and in good faith what legitimate and prudent expenditures are to be reimbursed for the involuntary frequency change. The Commission will intervene only as a last resort.⁴¹

Our experience in these matters is that parties generally engage in good faith negotiations and agree on the amount to be reimbursed well before a station actually changes channels.⁴² In the instant case, the parties have been disputing the appropriate reimbursement amount for more than eight years. And, it has been more than fourteen years since Fort Bend (Henderson) first committed to reimbursing Victoria for reasonable and prudent expenses related to the required channel change.⁴³ Victoria has made numerous requests for reimbursement from Henderson, to no avail.⁴⁴ Despite his pledge to reimburse Victoria's expenses, Henderson has failed to reimburse Victoria for even the subset of costs that he accepted as legitimate.⁴⁵ It was only after the staff cancelled the KHTZ(FM) license and deleted the station's call sign that Henderson offered to pay \$98,179.08 to cover his reimbursement obligation.⁴⁶ This offer is contingent on Victoria's acceptance of Henderson's reimbursement payment without a mutual release, which in our view, is not a good-faith offer that is intended put an end to the parties' on-going dispute.⁴⁷ In light of this history, it does not appear that Henderson has proceeded in good faith to meet

⁴⁰ *Id.* at 163-164, paras. 10-12.

⁴¹ *Peter Wayne Lechman*, Memorandum Opinion and Order, 8 FCC Rcd 3058 (MMB 1993), *rev. denied*, Memorandum Opinion and Order, 11 FCC Rcd 4104 (1996), *appeal denied sub nom. Lechman v. FCC*, 107 F.3d (D.C. Cir. 1997), *rehearing denied* (Mar. 4, 1997) (*Lechman*) (“[W]ith regard to reimbursement for the cost of changing frequency, the Commission expects the parties involved to determine expeditiously, mutually and in good faith what are reasonably and prudently incurred reimbursable expenditures. The Commission will involve itself in such matters only as a last resort.”). Further illustrating the Commission's reluctance to involve itself in such matters, the Commission recently upheld the Bureau's refusal to require a benefitting party to deposit funds into an escrow account to cover the reimbursement of expenses associated with an involuntary channel change. *See Prescott Valley*. The Commission stated that the Bureau can impose specific requirements related to reimbursement in involuntary channel change cases when there is evidence calling into question the financial ability of a benefitting party to reimburse an accommodating party or when the existence of “unusual circumstances” compel the Commission to intervene.” *Id.* at para. 16. The Commission stated that, in the absence of such evidence or circumstances, “the choice of how a benefitting party fulfills its reimbursement obligations (including the choice of whether to use an escrow account) is best left to the negotiations of the benefitting and accommodating parties themselves.” *Id.* at para 17.

⁴² While the obligation to negotiate reimbursement arises only after the Commission orders an involuntary license modification pursuant to section 316 of the Act, we encourage similarly situated parties to engage in discussions as to what is needed to implement an involuntary channel change *before* the actual change takes place. Using extended negotiations well after an involuntary channel change is accomplished is counter-productive and imposes unnecessary delay and expense on both parties in a reallocation proceeding.

⁴³ *See Ganado Order*, 25 FCC Rcd 836, 838-39, para. 9 (stating that Fort Bend (Henderson) indicated its (his) willingness to reimburse KVIC(FM) for reasonable and prudent expenses incurred in changing channels).

⁴⁴ *See supra* notes 11, 12, and 17.

⁴⁵ *See, e.g.*, 2014 LOI Response (stating that Henderson is willing to reimburse Victoria a total of \$30,126.52, which includes costs for the new antenna, antenna installment and replacement, and logo replacement).

⁴⁶ *See* Supplement (displaying a copy of a check dated August 27, 2020, made payable to Victoria Radio Works in the amount of \$98,179.08); Dismissal Letter.

⁴⁷ *See* Supplement at 5 (stating that Henderson “will not be delivering any release or indemnity to Victoria, nor is [Henderson] requesting any release or indemnity from [Victoria].”). In fact, in an *ex parte* meeting between counsel

his reimbursement obligation.⁴⁸ Commission intervention is therefore appropriate given the duration of the dispute between the parties and Henderson's apparent unwillingness to fulfill his reimbursement obligation.⁴⁹ After careful examination of the record, we generally agree with Victoria's assessment of the two categories of expenses that remain in dispute □□□ equipment and legal fees. As explained in more detail below, we find that Henderson must reimburse Victoria \$31,311.31 for the new transmitter and \$34,538.75 for legal fees. These amounts, in addition to costs associated with the new antenna (\$19,293.89), antenna installation and removal fees (\$6,332.63), replacement of the logo design (\$450.00), engineering services related to KVIC(FM)'s construction permit application for the new facilities (\$3,500.00), and FCC filing fees (\$1,140.00), are reflected in the total sum of \$96,566.58.⁵⁰

Equipment. In *Circleville*, the Commission determined that a licensee is entitled to reimbursement for new equipment only to the extent the equipment is actually required, and only for equipment corresponding to that previously in use.⁵¹ The Commission stated that the party benefiting from the channel change is not required to pay for improving and modernizing the existing station's facilities.⁵² In this instance, Victoria requests reimbursement in the amount of \$31,311.31 to cover the cost of a new 5 kW transmitter which it purchased to effectuate the required channel change.⁵³ Victoria documents this expense with an invoice and an engineering statement demonstrating that a 5 kW transmitter was necessary to comply with the terms of its authorization.⁵⁴ Henderson contests the

for SCM and Victoria and Commission staff held on December 14, 2020, several months after tendering the offer, SCM indicated that it intends to take this matter to another forum to recoup a portion of any money that it is ultimately required to pay through this proceeding. *See supra* note 27.

⁴⁸ Should it subsequently be determined that either party here has made misrepresentations to, or lacked candor with, the Commission, we reserve the right to recommend to the Commission that an evidentiary hearing be held pursuant section 312(a) of the Act. *See* 47 U.S.C. § 312(a). *See also, e.g., Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983) (stating that misrepresentation involves false statements made with an intent to deceive; lack of candor involves concealment, evasion, or other failure to be fully forthcoming, accompanied by an intent to deceive); *San Francisco Unified School District*, Hearing Designation Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 13326, 13337 (2004) ("[a] false statement, even absent an intent to deceive, may constitute an actionable violation of Section 1.17 of the Commission's rules."); 47 CFR § 1.17 (prohibiting "[w]ritten and oral statements of fact that are intentionally incorrect or misleading and written statements that are made without a reasonable basis for believing the statement is correct and not misleading.").

⁴⁹ *See Prescott Valley* at n.55 (stating that "Commission intervention might be appropriate if there is evidence calling into question a benefitting party's willingness to fulfill its obligations to reimburse an accommodating party."). As indicated above, only those expenses for the KVIC(FM) replacement transmitter (\$31,311.31) and legal fees (\$52,474.00) are in dispute. *See, e.g., Circleville supra* n.39; *Lechman supra* n.41; *Harold A. Jahnke*, Memorandum Opinion and Order, 74 FCC2d 265 (1979) (*Jahnke*) (finding that legal expenses incurred in the negotiation process are properly reimbursable); *Harold M. Weiss*, Letter Decision, 28 FCC Rcd 3234 (MB 2013) (*Weiss*) (allowing reimbursement for equipment and legal expenses that are incurred in the negotiation process and related to the involuntary channel change).

⁵⁰ *See* SMC Response to Updated Reimbursement Request. Costs associated with the new antenna, antenna installation and removal fees, replacement of the logo design, engineering services related to KVIC(FM)'s construction permit application for the new facilities, and FCC filing fees are not in dispute.

⁵¹ *Circleville*, 8 FCC 2d at 163-64, para. 12.

⁵² *Id.*

⁵³ *See* Victoria Updated Reimbursement Request.

⁵⁴ *See* Victoria Updated Reimbursement Request, Exhibit 2 and Exhibit 10.

purchase of the new transmitter, arguing that Victoria could have re-tuned KVIC(FM)'s former transmitter for much less.⁵⁵

We find that the purchase of a new 5 kW transmitter was both reasonable and necessary to implement the required channel change with the replacement antenna agreed upon by the parties. The previous transmitter in use at the KVIC(FM) facility prior to the frequency change was manufactured during the 1970s (i.e., 1970 Gates/Harris 2/2.5 kW transmitter).⁵⁶ The frequency change from channel 236C3 to channel 284C3 necessitated a change to the KVIC(FM) antenna, which then triggered the need for a new or re-tuned transmitter.⁵⁷ Engineers for both parties concur that in its existing state KVIC(FM)'s former transmitter could not be used with the new antenna to achieve an effective radiated power (ERP) of 12.7 kW on channel 284C3 and that it was necessary for Victoria to replace additional equipment to operate KVIC(FM) as currently authorized.⁵⁸ Due to the unavailability of original replacement components for KVIC(FM)'s former 2/2.5 kW transmitter, Victoria determined that it was necessary to replace the 2/2.5 kW transmitter with the 5 kW transmitter.⁵⁹ We conclude that Victoria's decision to replace the transmitter was reasonable. We find unavailing Henderson's argument that substitute replacement parts from other manufacturers could have been used to re-tune the former transmitter.⁶⁰ Although using substitute replacement parts may be common practice or less expensive, requiring Victoria to retrofit its 50-year old transmitter with substitute replacement parts to move from channel 236C3 to channel 284C3 is unreasonable, especially when it is not certain that the operation of KVIC(FM) with substitute parts would be equivalent to its current operation. Victoria has demonstrated that the 5 kW transmitter was necessary for it to comply with the terms of its authorization, and thus, was a reasonable and prudent expense connected with the frequency change. We therefore find that reimbursement for the new transmitter is consistent with *Circleville* and SCM's predecessor's

⁵⁵ See 2014 LOI Response (stating that "Henderson is more than willing to pay for a transmitter retuning but does not feel that it is just or fair to be required to pay for a new transmitter").

⁵⁶ See Victoria Updated Reimbursement Request, Engineering Statement; SMC Response to Updated Reimbursement Request, Technical Statement.

⁵⁷ Victoria's consulting engineer states that the channel change necessitated a change in the antenna. Victoria Reimbursement Request Exh. 10, Engineering Statement at 2 (Victoria Engineering Statement). According to the engineer, "the frequency of operation of FM antennas can usually be changed by a couple of channels with relative ease," but "changing the frequency of an antenna designed for single channel operation, as was the case with the KVIC antenna, by 48 channels, or 9.6 MHz is not reasonable." *Id.* While SCM's technical consultant suggests that KVIC(FM) could have continued to use its old antenna on the new frequency, the consultant does not dispute Victoria's claim that changing the frequency of KVIC(FM)'s former antenna by 48 channels was not a reasonable option. In addition, we note that Henderson did not object to the replacement of KVIC(FM)'s former antenna, and that he maintains his acceptance of the costs associated with purchasing and installing the new antenna as being "reasonable and prudent" expenses in accordance with the standard for reimbursement set forth in *Circleville*. See SMC Response to Updated Reimbursement Request.

⁵⁸ See Victoria Engineering Statement at 3 (asserting that "[t]he use of the [current] 5 kW transmitter is necessary for [KVIC(FM)] to comply with the terms of its authorization"); SMC Response to Updated Reimbursement Request Attach., Technical Statement at 2 (SCM Technical Statement) (suggesting that "any modern 10 watt exciter (or transmitter) [could have] be[en] used" to make KVIC(FM)'s former transmitter operate on channel 284C3).

⁵⁹ Victoria Updated Reimbursement Request, Engineering Statement.

⁶⁰ SMC Technical Statement at 2-3. See *Circleville*, 8 FCC 2d at 163-64, para. 12 (observing that a licensee is not entitled to reimbursement for equipment when that equipment "can be retuned for a relatively small shift"). In this case, KVIC(FM) was required to move 48 channels, or 9.6 MHz.

reimbursement commitment as set forth in the *Ganado Order*.⁶¹ Accordingly, we approve reimbursement in the amount of \$31,311.31 for the new transmitter.

Legal Expenses. The Commission has allowed reimbursement for legal expenses “incurred in the negotiation process” and for filing or responding to pleadings “reasonably related to the necessary change of channel.”⁶² Here, Victoria has requested reimbursement in the amount of \$52,474.00 for its legal expenses.⁶³ We find that most of these expenses are reimbursable because they are related to the lengthy time period in which the parties were negotiating and filing pleadings related to the channel change.⁶⁴ However, we have identified some expenses that either were incurred before the release of the *Ganado*

⁶¹ See *Circleville*, 8 FCC 2d at 163-64, para. 12; *Ganado Order*, 25 FCC Rcd 836. SCM’s technical consultant asserts that it is proper for SCM (Henderson) to reimburse Victoria for expenses to effectuate a frequency change at the 6.5 kW power level and not include any improvements (such as a power increase). SCM Technical Statement at 1. However, we note that at the time SCM’s predecessor pledged to reimburse KVIC(FM) for its reasonable and prudent out-of-pocket expenses incurred in making the requested channel change, KVIC(FM) was operating with an authorized ERP of 13 kW. See Victoria Engineering Statement at 1-2 (citing Application File Nos. BLH-20000501ACB, BPH-20071106ACE, and *Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed*, Public Notice, Report No. 2849 (CGB Jan. 24, 2008)). Therefore, we reject the assertion that KVIC(FM)’s operation with an ERP of 12.7 kW constitutes an improvement or modernization of the station’s facilities, which the Commission held is inappropriate for reimbursement in *Circleville*, 8 FCC 2d at 163-64, para. 12.

⁶² See, e.g., *Jahnke; Weiss*.

⁶³ See Victoria Updated Reimbursement Request, Exhibit 7 (Victoria law firm invoice documenting \$36,151.25 for legal expenses incurred between February 2008 through June 2014) and Exhibit 8 (Victoria law firm invoice documenting \$16,322.75 for legal expenses incurred between July 2014 and December 2020). According to our calculations, the total amount reflected in Exhibit 8, and claimed as part of Victoria’s reimbursement request, includes overcharges in the amount of \$872.75, and thus, we will exclude these charges from Victoria’s claim for legal expenses. Specifically, on August 26, 2014, due to a typographical error, Victoria’s law firm invoiced \$965.25 when it should have invoiced \$956.25. On September 26, 2014, the firm invoiced \$245.00, but it did not deduct charges that had been redacted (\$138.75). Similarly, on August 31, 2018, the firm invoiced \$1,362.50 but did not deduct redacted charges in the amount of \$225.00. Because Victoria did not provide any information regarding the nature of these redacted charges, we are unable to determine that they meet the standard for reimbursement of legal expenses. See, e.g., *Jahnke; Weiss*. Finally, on October 31, 2019, the firm invoiced \$2,600.00, but it did not deduct from the total amount reflected in Exhibit 8 the \$500.00 courtesy discount recorded on the invoice.

⁶⁴ *Id.* at Exhibits 7 and 8 (containing reimbursement request for legal services performed by law firm partners and associates on behalf of Victoria, which includes research and legal writing for various pleadings and memoranda related to the channel change, telephone calls, conferences, and other correspondence with opposing counsel and FCC staff, correspondence on general settlement matters, etc.).

*Order*⁶⁵ or appear to be associated with prohibited *ex parte* communications.⁶⁶ We have subtracted these impermissible legal expenses as well as the overcharges noted below from the total amount claimed in Victoria's request.⁶⁷ Having done so, we find that Victoria is due reimbursement from Henderson in the amount of \$34,538.75 for legal expenses incurred in effectuating the required channel change.

Conclusion/Actions. For the reasons set forth above, **IT IS ORDERED**, that the Petition for Reconsideration filed by S Content Marketing, LLC, on October 17, 2019, **IS GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED, that our action of September 12, 2019, dismissing the application for the renewal of license filed by S Content Marketing, LLC, for station KHTZ(FM) (File No. BRH-20130328ADT) **IS RESCINDED**, and the Application is reverted to pending status.

IT IS FURTHER ORDERED, that the license and call sign for station KHTZ(FM), Ganado, Texas, **ARE REINSTATED**.

IT IS FURTHER ORDERED, that S Content Marketing, LLC, or its sole principal, Roy E. Henderson, **SHALL REMIT** to Victoria Radio Works the sum of \$96,566.58 within 30 days of the date of this letter. Certification of payment shall be filed with the Office of the Secretary of the Commission within three days of the tender of payment.

IT IS FURTHER ORDERED, that Victoria Radio Works **SHALL CONFIRM** with the Media Bureau that it has received the sum of \$96,566.58 from S Content Marketing, LLC, or its sole principal, Roy E. Henderson, within 30 days of the date of this letter.

⁶⁵ We find unavailing Henderson's argument that reimbursement of Victoria's legal fees is impermissible because they arose and accumulated from a series of private business decisions undertaken by Victoria. *See* SMC Response to Updated Reimbursement Request. As discussed above, most of the legal expenses incurred by Victoria are related to the involuntary channel change and are properly reimbursable. We note that legal expenses incurred in ongoing litigation related to the required channel change are reimbursable as well. *See Jahnke*. However, any legal expenses incurred prior to the release of the *Ganado Order* (i.e., the order directing the involuntary channel change) are not required to be reimbursed. *Id.*; *see supra* note 4; Victoria Updated Reimbursement Request at Exhibit 7 (identifying \$13,837.50 of claimed legal expenses incurred before the release of the *Ganado Order* on January 29, 2010). We will therefore exclude these charges from Victoria's claim for legal expenses.

⁶⁶ Pursuant to section 1.1208 of the Rules, this matter is restricted for purposes of the Commission's *ex parte* rules. *See* 47 CFR §1.1208. In restricted proceedings, the Rules forbid *ex parte* presentations to or from FCC decision-making personnel. An *ex parte* presentation is any communication that concerns the merits or outcome of a proceeding and is not served on the parties to the proceeding, or, if oral, is made without their opportunity to be present. *See* 47 CFR §1.1202(b)-(c). It appears that \$3,225 of Victoria's claimed legal expenses may be associated with telephone calls and conferences with Victoria and Commission staff where Henderson or Henderson's counsel were not present. *See* Victoria Updated Reimbursement Request at Exhibit 7 and 8. Because these discussions may not have been consistent with our *ex parte* rules in sections 1.1208 and 1.1202, we exclude them from the list of required reimbursable expenses.

⁶⁷ Total amount claimed for legal expenses (\$52,474) – legal expenses incurred prior to the release of the *Ganado Order* (\$13,837.50) - impermissible legal expenses associated with prohibited *ex parte* communications (\$3,225) – overcharges (\$872.75) = \$34,538.75. *See* Victoria Updated Reimbursement Request at Exhibit 7 and 8.

Finally, **IT IS ORDERED**, that further action on the captioned license application **IS HELD IN ABEYANCE** pending notification by S Content Marketing, LLC, or its sole principal, Roy E. Henderson, that the amount herein found to be due and owing to Victoria Radio Works has been paid.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau